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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 8, 1960.

I

OPINIONS BELOW

The memorandum opinion and order of December 4, 1958 (R. 60a), and the supplemental opinion and order of March 16, 1959 (R. 63a) of the United States District Court for the Southern District of Ohio, Eastern Division, are unreported. The opinion of the United States Court of Appeals for the Sixth Circuit of February 8, 1960 (R. 91a), is reported at 274 F. (2d) 771. The order of the Court of Appeals denying petitioners' petition for rehearing (R.

124a) is unreported. True copies of said opinions and orders are appended to this petition in the Appendix hereto, at pages 25-45.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered February 8, 1960 (R. 89a). The petition of the appellants for a rehearing was denied by said court on March 23, 1960 (R. 124a). The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U.S.C., which provides:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

III

QUESTIONS PRESENTED

This case involves the question of whether the shareholders of petitioner, The Columbus Mutual Life Insurance Company, can lawfully amend Article V of the charter of that company, prospectively. Article V of the Columbus Mutual Life Insurance Company charter is set forth at pages 46-47 of the Appendix to this petition.

Respondents, who are mutual plan, or participating, policyholders of said company sought to enjoin the company's shareholders from amending Article V. The District Court found that under the provisions of Article V equitable ownership of the surplus of the Columbus Mutual Life Insurance Company is vested in the company's mutual plan or participating policyholders and for that reason enjoined petitioners from taking any action for making effective the proposed amendment to Article V and from taking

any action in derogation of Article V as now constituted contrary to rights of such policyholders. The Court of Appeals affirmed. The questions presented are:

1. Can the shareholders of the Columbus Mutual Life Insurance Company amend Article V of that company's charter prospectively?

2. Do the mutual plan policyholders of the Columbus Mutual Life Insurance Company possess any vested contractual rights to the future and as yet unearned profits or surplus of that company by virtue of Article V of the company's charter?

3. Did the Court of Appeals err in holding that the proposed amendment to Article V of the Columbus Mutual Life Insurance Company charter would retroactively impair vested rights of the mutual plan policyholders of that company; and, if not, in what respect is said proposed amendment retroactive?

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are Article I, Section 10 of the United States Constitution; Article XIII, Section 2 of the Constitution of the State of Ohio, and Sections 1701.69 and 1701.71 of the Revised Code of Ohio. These constitutional and statutory provisions are set forth in the Appendix to this petition at pages 62-66.

V

SUMMARY STATEMENT OF MATTER INVOLVED

This action arises from a controversy between the shareholders, on the one hand, and the mutual plan policyholders, on the other, of the Columbus Mutual Life Insurance Company, as to the ownership of that company's surplus fund

and as to the power of the shareholders to amend that company's articles of incorporation. The basic facts, which are not in dispute, are as follows:

Petitioner, The Columbus Mutual Life Insurance Company (hereinafter sometimes called "Columbus Mutual"), is a legal reserve stock life insurance company organized and existing under the laws of the State of Ohio, with its principal place of business located in Columbus, Ohio (R. 5a). The company was incorporated in 1906.

The articles of incorporation of Columbus Mutual are set forth in the Appendix to this petition at pages 46-57. They provide, among other things, that:

(1) Columbus Mutual is authorized to write policies of life insurance on either the stock or mutual plan (Article III, Appendix, Page 46).

(2) The original authorized capital of Columbus Mutual was $100,000 divided into 1,000 shares of $100 par value each (Article IV, Appendix, Page 46).

(3) The business of the company and its corporate powers are vested exclusively in a board of directors, all of whom are elected by the company's shareholders, and not by its policyholders (Article VI, Appendix, page 48).

Since 1906, the company's articles of incorporation (hereinafter called the "charter") have been amended six times for the purpose, in each instance, of increasing the authorized capital. These amendments are set forth in the Appendix to this petition at pages 50-57. As a result of these various amendments, the company's present authorized capital is $500,000 divided into 5,000 shares of $100 par value each, all of which are issued and outstanding.

Except for the foregoing amendments there have been no other amendments to the company's charter, save for the proposed amendment involved in this action.

Columbus Mutual, since its incorporation, has been a successful and prosperous life insurance company. As of the close of the fiscal year, December 31, 1957, following the commencement of this action in the District Court, Columbus Mutual possessed (R. 25a):

(a) Insurance in force in the amount of	$479,919,138.00
(b) Unassigned surplus in the amount of	11,218,344.96
(c) Voluntary reserves in excess of required legal reserves in the amount of	6,795,453.59
(d) Total assets in the amount of	134,883,105.15
(e) Approximately 160,000 policyholders.	

On October 28, 1957, the shareholders of Columbus Mutual, including The Ohio State Life Insurance Company which owns 4,977, or 99.54%, of the 5,000 authorized and outstanding shares of Columbus Mutual, duly adopted an amendment to Article V of the Columbus Mutual charter. Article V of the Columbus Mutual charter is set forth in the Appendix to this petition at page 46. The text of the proposed amendment of October 28, 1957, to Article V is set forth in the Appendix to this petition at page 57.

Article V of the charter provides, in substance, that (1) annual dividends may be paid on outstanding stock at a rate not to exceed ten percent of the par value of the stock; (2) the directors may pay off and retire the stock at a price of $200 a share; (3) when all stock is retired the company shall be reorganized into a mutual company composed of the policyholders. In addition, Article V provides that, "Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus

of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide."

The proposed amendment to Article V provides, in substance, that (1) the unassigned surplus of Columbus Mutual as of December 31, 1956, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company and no dividends to any stockholder of the company shall be payable therefrom; (2) annually, for a period of twenty-five years, there shall be added to this special surplus from the earnings of the company a sum equal to the net earned interest rate on the mean invested assets after all taxes based on income; (3) regular dividends shall be paid from the earnings of the company to all participating policyholders without distinction, and additional dividends may be paid out of the special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of the amendment; (4) in the event of dissolution and liquidation at any time so long as any participating policies of the company in force on the effective date of the amendment are then in force, such policyholders shall be entitled to distribution from such special surplus, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of the amendment; and (5) at the maturity of the last participating policy in force on the effective date of the amendment, the special surplus, as then existing, shall be permanently held for the protection of all policyholders and no dividends may at any time be declared to shareholders, except out of surplus over the above such amount.

This proposed amendment, following its adoption by the Columbus Mutual shareholders, was submitted to the Sec-

retary of State of Ohio for filing and was, in turn, submitted by him to the Attorney General of Ohio as required by Ohio law. The Attorney General of Ohio approved the amendment but advised the Secretary of State to refuse to record it because of the objections raised by respondents and in order that the rights of respondents, and other policyholders, could be adjudicated (R. 84a). The Attorney General's letter of transmittal and certification with respect to the amendment is set forth in the Appendix to this petition at page 60. Respondents, plaintiffs below, who are mutual plan policyholders of Columbus Mutual, commenced this action in the United States District Court for the Southern District of Ohio, Eastern Division, against petitioners, The Ohio State Life Insurance Company, Columbus Mutual, and the directors, officers and stockholders of both companies. Jurisdiction of the District Court was based upon the amount involved and because of diversity of citizenship and because the action arises under the Constitution of the United States.

In this action, respondents sought, on behalf of themselves and all other mutual plan policyholders of Columbus Mutual, declaratory judgment asking the District Court, in substance, to declare that (1) the mutual plan policyholders of Columbus Mutual are the beneficial owners of the surplus and voluntary reserves of that company, save for certain limited rights of the shareholders, by virtue of the provisions of Article V of the charter; (2) the beneficial interest in the surplus created by Article V is a vested right of contract protected against impairment by the contract clause of the United States Constitution; (3) the shareholders of Columbus Mutual have no power or authority to amend Article V of the charter.

Respondents filed their original complaint in the District Court on November 12, 1957, and thereafter filed their

amended complaint on March 28, 1958 (R. 5a). Petitioners, defendants below, filed their answer and counterclaim for declaratory relief on March 28, 1958 (R. 37a), and an amendment thereto on March 31, 1958 (R. 52a). In their counterclaim, petitioners prayed that the District Court declare, among other things, that the proposed amendment to Article V is a lawful amendment and in accordance with the Constitution and laws of the United States and of the State of Ohio; that the stockholders of Columbus have a legal right to amend Article V of the Columbus Mutual charter; and that Article V neither creates nor confers any vested rights of property to contract in of upon the policyholders of Columbus Mutual. Petitioners further requested the district court to declare their rights under the charter of Columbus Mutual and the Constitution and laws of Ohio.

On March 31, 1958, respondents filed their reply (R. 52a) to petitioner's amended answer and counterclaim, and on April 1, 1958 petitioners and respondents each filed their respective motions for summary judgment (R. 53a) pursuant to Rule 56 of the Federal Rules of Civil Procedure. Thereafter, the District Court granted the Superintendent of Insurance of Ohio leave to intervene as a party defendant and accepted the superintendent's answer to the amended complaint and his motion for summary judgment (R. 58a).

On December 4, 1958, the District Court rendered its memorandum opinion and order granting respondents' motion for summary judgment and overruling petitioners' motion for summary judgment (R. 60a). In this decision the District Court held that the equitable ownership of the surplus of Columbus Mutual, under the company's charter, is vested in its policyholders on the mutual plan, and that, in the aggregate, such policyholders a entitled to the whole of such surplus.

The District Court augmented its memorandum opinion and order with a supplemental opinion and order filed March 16, 1959 (R. 63a). In that supplemental order the District Court decreed:

1. That the surplus of Columbus Mutual belongs to its mutual plan policyholders subject only to certain limited stockholder rights;

2. *That the stockholders of Columbus Mutual cannot exercise their voting power to relieve their stock of the restrictions and limitations of Article V of the company's charter;*

3. That the proposed amendment, if permitted to become effective, would deprive the mutual plan policyholders of vested property rights in the surplus without due process of law.

The District Court, by its supplemental opinion and order perpetually enjoined petitioners from taking any action to make effective the proposed amendment and from taking any action in derogation of the terms of Article V "as now constituted" contrary to the rights of the policyholders under that article "as such rights are declared herein." The District Court effectively prohibited petitioners from ever prospectively amending Article V of the Columbus Mutual charter.

Petitioners filed their notice of appeal from the foregoing decisions of the District Court in the United States Court of Appeals for the Sixth Circuit on March 20, 1959 (R. 67a). The Court of Appeals heard the case upon oral argument on December 16, 1959 (R. 88a) and, on February 8, 1960, rendered its decision affirming the District Court (R. 91a).

In its opinion of February 8, 1960, the Court of Appeals held that Columbus Mutual is a stock company which issues some of its policies on the mutual plan. The court further

held that the provisions of Article V of the Columbus Mutual charter control the extent to which the usual rights of shareholders have been curtailed, and the court construed Article V as giving to the mutual plan policyholders "a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein." The Court of Appeals went even further than the District Court and held that such vested right includes not only the surplus of Columbus Mutual but also its profits, which are currently represented by the company's voluntary reserves. It is significant to note that the court held that this beneficial interest in surplus and profits does not arise from the provisions of the insurance policies held by respondents and other mutual plan policyholders, but is, rather, a proprietary right which exists solely by virtue of Article V of the charter and in addition to rights acquired by them under the terms of their insurance policies.

In its opinion the court recognized the reserved statutory power in Ohio to amend corporate charters, but held that this reserved power does not include the right on the part of the state, acting through the stockholders of a corporation, to amend the charter retroactively in a way which will impair vested rights previously acquired under a contract between the corporation and parties other than stockholders. The court then held that the rights which the policyholders have in the surplus and profits of Columbus Mutual by virtue of Article V, are rights protected by Article I, Section 10 of the United States Constitution, and that the proposed amendment to Article V would be an impairment "of the contract obligations of the corporation running to the policyholders."

On February 27, 1960, petitioners filed their petition for rehearing in the Court of Appeals (R. 103a), which petition was denied by the court on March 23, 1960 (R. 124a).

VI

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals involves a far-reaching matter of Ohio corporation law which affects not only the interests of The Columbus Mutual Life Insurance Company, a large Ohio insurance company, and its 160,000 policyholders, but also the interests of Columbus Mutual's principal shareholder, The Ohio State Life Insurance Company, and that company's policyholders, numbering some 100,000, and its 1,230 stockholders.

The decision of the Court of Appeals should be reviewed because it erroneously construes Article V of the Charter of Columbus Mutual, an Ohio stock company, as a third party beneficiary contract which vests in that company's mutual plan, or participating, policyholders a right not only to the company's *existing* surplus and profits but also such contractual right in the company's *future* and as yet unearned surplus and profits. *In so holding, the Court below has decided an important and far reaching question of Ohio law in a way which is in direct conflict with the constitution and law of that state, and has extended the application of the contract clause of the United States Constitution in a way which is in conflict with the decisions of the Supreme Court of Ohio and of this Court.*

At the outset, petitioners emphasize to the Court that they do not, by this petition, seek a review of the lower court's determination that respondents, and the other mutual plan policyholders of Columbus Mutual, possess a vested beneficial interest in the company's *existing* surplus and profits, including its voluntary reserves, by virtue of Article V of the company's charter.

The Court of Appeals, however, in affirming the permanent injunction decreed against petitioners by the District Court, goes much further and, in substance and effect, has

construed Article V as a third party beneficiary contract under the terms of which the company's participating policyholders are held to have a vested right of contract in and to the company's *future* and as yet unearned surplus and profits. This contractual right to future profits, the lower court has held, is a vested right which is protected against impairment by Article I, Section 10, of the United States Constitution. The lower court has held that petitioners, the shareholders of Columbus Mutual, can never amend Article V of the charter prospectively, notwithstanding the reserved power of amendment contained in Article XIII, Section 2, of the Ohio Constitution, and conferred upon shareholders by Sections 1701.69 and 1701.71 of the Revised Code of Ohio. Petitioners submit that the decision conflicts directly with decisions of the Supreme Court of Ohio and is erroneous for the following reasons:

1. Assuming for the purpose of this petition, that, as the lower court has held, Article V of the Columbus Mutual charter constitutes a third party beneficiary contract from which the mutual plan policyholders derive a vested interest in the company's *existing* surplus and profits, that right of contract attaches only to surplus and profits actually earned and accumulated. It does not and cannot attach to future surplus and profits which may, or may not, be earned at some future time and which, at the present, are purely contingent.

The foregoing proposition is fully supported by the language of Article V itself, which even the lower court stated, at one point in its decision, has reference to surplus "when and as accumulated". This construction of Article V is further supported by the decisions of the Supreme Court of Ohio in *State ex rel Ellis v. Union Central Life Insurance Company*, 13 Ohio C. C. R. (n. s.) 49, Affd. w/o opn. 84 Ohio St., 459 (1911), and in *Belden v.*

Union Central Life Insurance Co., 73 Ohio App., 267, affd. 143 Ohio St., 329 (1944). These two cases involved an Ohio legal reserve stock life insurance company which wrote mutual plan insurance policies and whose by-laws limited the amount of dividends which shareholders of the company could receive. It was expressly held in these cases that an Ohio stock insurance company is under no duty to either create or to maintain a surplus. As the Ohio Court of Appeals pointed out in its decision in the *Belden* case, supra, the claim of a mutual plan policyholder to a vested right of contract in the insurer's surplus was tantamount to a claim that a participating policyholder "has a vested right to uninterrupted continuance of insurer's capital structure". This contention the court flatly rejected in its decision, which was affirmed by the Supreme Court of Ohio. See, also, *Russell v. Pittsburgh Life and Trust Co.*, 132 App. Div., 217; 116 N. Y. Supp., 841 (1909), wherein it was held that a mutual plan policyholder of a stock life insurance company, whose business was conducted on the mutual plan and whose charter required that surplus, above a limited dividend to shareholders, was to be equitably applied for the benefit of policyholders, had no standing to sue to restrain a transfer of the assets of the company to a foreign stock insurance company pursuant to a contract for the merger of the two companies.

The import of the above-cited decisions is simply that there can be no vested right of contract in a purely contingent fund such as future surplus or profits which have not accrued. Nor can mutual plan policyholders of an Ohio stock life insurance company claim a vested right to the uninterrupted continuation of their insurer's capital structure. The validity of these propositions is in no way diminished by the decision of the Ohio Court of Appeals in *Bell v. Union Central Life Insurance Co.*, 14 Ohio C. C. R.

(n. s.) 385, (1911), relied upon by the court below. That case, which was never affirmed by a majority of the Ohio Supreme Court (see, 87 Ohio St., 475, 92 Ohio St., 521), held only that the prior *quo warranto* proceeding, *State ex rel. Ellis v. Union Central Life Insurance Co., supra.*, was not a bar to a subsequent policyholder action against the company. The *obiter dictum* of the Court of Appeals decision in the *Bell* case, supra, neither states nor implies that the mutual plan policyholders involved therein had any contractual right, by virtue of their insurer's charter, in the insurer's future profits. Petitioners respectfully submit that as to that question the *Ellis* case, supra, and the later *Belden* case, supra, are controlling. The decision of the Court of Appeals in the case at bar is in direct conflict with these decisions of the Supreme Court of Ohio.

2. The Court of Appeals, by its decision in this case, has erroneously curtailed the scope and effect of Article XIII, Section 2 of the Ohio Constitution and Sections 1701.69 and 1701.71 of the Revised Code of Ohio.

Article XIII, Section 2 of the Ohio Constitution provides, in relevant part, that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

This provision was adopted in Ohio in 1851, as a result of the decision in *The Trustees of Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 (1819). It has been a part of the Ohio Constitution ever since and has never been amended. The General Assembly of Ohio has delegated this reserved power of amendment to the stockholders of Ohio stock companies. In 1906, when Columbus Mutual was incorporated, this power of amendment was conferred upon stockholders by Section 3238a of the Revised Statutes of Ohio, 83 Ohio Laws, 193 (1886). In 1957, when the pro-

posed amendment to Article V was adopted by petitioners, the power to amend was conferred upon stockholders by Section 1701.69 and 1701.71 of the Revised Code of Ohio (126 Ohio Laws, 432), which sections are still in effect today.

It is well established in Ohio, and elsewhere, that where power to amend corporate charters is reserved to the state by constitutional provision, and where the state has delegated that reserved power to corporate shareholders by statute, such constitutional and statutory provisions enter into and form a part of every charter granted thereafter, and are fully binding upon corporate shareholders, corporate directors and, as in the case at bar, third persons who claim rights as third party beneficiaries by virtue of charter provisions. *Northern Central Railway Company v. Maryland*, 187 U. S., 258 (1902); *Louisville Water Co. v. Clark*, 143 U. S., 1 (1892); *Belden v. Union Central Life Insurance Co.*, 143 Ohio St., 329 (1944); *Schaffner v. Standard Boiler and Plate Iron Co.*, 150 Ohio St., 454 (1948); *Williams v. National Pump Corp.*, 46 Ohio App., 427, dism. for want of court, q., 126 Ohio St., 457 (1933). *Grobe v. Erie County Mutual Insurance Co.*, 57 N. Y. Supp., 292, affd. w/o opn., 169 N. Y., 613 (1902); 13 Am. Jur., Corporations, Sec. 90, p. 234.

In short, every shareholder and every policyholder took his respective share of stock or policy of insurance with the full knowledge, so far as the law is concerned, that the State of Ohio, and through it the shareholders of Columbus Mutual, had full power and authority to amend the company's charter prospectively.

While it is true that the reserve power of amendment cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power, it is equally true that the reserve power can be legitimately exercised

to effect prospective changes in the corporate structure, as shown by the above-cited authorities.

The Court below, having erroneously determined that Article V confers vested contractual rights to future surplus and profits upon the mutual plan policyholders of Columbus Mutual, further determined that the proposed amendment to Article V would retroactively impair such rights, and on that basis the lower court affirmed the District Court's permanent injunction which restrains the Columbus Mutual shareholders from ever amending Article V. In support of these determinations, the Court of Appeals relied upon *Coombes v. Getz*, 285 U. S., 434 (1932); *International Steel & Iron Co. v. National Surety Co.*, 297 U. S., 657 (1936); *Wheatley v. The A. I. Root Co.*, 147 Ohio St., 127 (1946); *Schaffner v. Standard Boiler and Plate Co.*, 150 Ohio St., 454 (1948) and *Partridge v. Michigan Mutual Windstorm Insurance Co.*, 256 Mich., 76 (1931).

Petitioners respectfully but emphatically submit that not one of these cases, cited by the Court below, is authority for the proposition that the mutual plan policyholders of Columbus Mutual possess a vested contractual right, by virtue of Article V, in the company's future surplus and profits, or to the uninterrupted continuation of the company's present corporate structure. In short, not one of these cases is authority for the proposition that the shareholders of Columbus Mutual cannot amend Article V of their company's charter prospectively, as they are now enjoined from doing.

Coombes v. Getz, supra, involved an action by the assignor of a corporate creditor under a California constitutional provision which imposed personal liability on corporate directors in certain circumstances. While the creditor's action against a director, under this provision, was pending, the provision was repealed and as a result thereof the credi-

itor's action was dismissed. This Court held that the creditor's right of action to enforce the director's liability vested prior to the repeal of the provision creating such liability. There was, as the opinion clearly shows, no holding that a corporate charter cannot be amended prospectively. As Mr. Justice Cardozo aptly pointed out in his dissent to the Court's decision, "the claim of an irrepealable contract cannot be predicated upon a contract which is repealable."

International Steel & Iron Co. v. National Surety Co., supra., held only that the obligation of a highway contractor's bond given to the state to secure payment to materialmen is unconstitutionally impaired by a subsequently enacted statute which released and discharged the obligation of the bond and substituted therefor the obligation of another bond without the acquiescence of the obligee. Again, there was no holding that the statute in question impaired bonds issued after its enactment.

Wheatley v. A. I. Root Co., supra, held that a corporate charter, under the terms of which preferred shareholders were granted a right to receive dividends at the rate of five per cent per annum, which dividends were cumulative, could not be amended so as to deprive such shareholders of dividends which *had accrued but which were unpaid* at the time the charter amendment was adopted where the statute under which the amendment was adopted had been enacted subsequent to the granting of the charter and to the issuance of the preferred shares.

Schaffner v. Standard Boiler & Plate Iron Co., supra., involved a plan of corporate recapitalization similar to that involved in the *Wheatley* case, supra. It was here held that the corporation was fully authorized, under the reserve power and statutes of Ohio, to amend its capital structure with the limitation only that in so doing it did not impair

the right of preferred shareholders to receive their *accumulated but unpaid* dividends.

Partridge v. Michigan Windstorm Insurance Co., supra, involved a mutual casualty insurance company which had no stockholders and which was owned exclusively by its policyholders. The company's charter authorized the directors to amend or repeal the company's by-laws or charter. The company insured plaintiff's wood silo, under a by-law authorizing such insurance, and thereafter the directors amended the by-law so as to disclaim any liability for loss of wood silos. The court held only that the plaintiff's insurance policy was not affected by the amendment.

Not one of the foregoing cases is authority for the proposition that the mutual plan policyholders of Columbus Mutual possess, by virtue of Article V, a vested right in a future surplus which the company is under no duty to either earn or create, or a right to the perpetual continuation of Columbus Mutual's present capital and corporate structure. It is earnestly submitted that the lower court's reliance upon the foregoing decisions is misplaced.

3. Petitioners respectfully submit that the lower court's decision, insofar as it holds that the mutual plan policyholders of Columbus Mutual possess a vested right in the company's future surplus and profits by virtue of Article V, is in direct conflict with the following cases wherein it has been held that, under a constitutionally reserved power of amendment, the corporate structure of a corporation can be altered prospectively.

For example, it was held by this Court in *Wright v. Minnesota Mutual Life Insurance Co.*, 193 U.S. 657 (1904), that legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat premium plan does not work a violation of the company's contract with those policyholders who

failed to change to the new plan. So, too, in *Polk v. Mutual Reserve Fund Life Association*, 207 U. S. 310 (1907), it was held that contract obligations between an association insuring lives on the cooperative plan and its members are not unconstitutionally impaired by the reorganization of such association as a mutual level premium company under a state statute. Each of these cases, it will be noted, involved a mutual insurance company which was owned by its policyholders. In each of these cases it was held that the reserved power of amendment, in force when the corporations were incorporated, would sustain, as against an objection founded on the contract clause of the Federal Constitution, state statutes which permitted a prospective alteration of the companies' corporate structure without the consent of the policyholder-members.

The Supreme Court of Nebraska held, in the case of *In Re Leininger*, 115 Neb. 801, (1927), held that there was no impairment of the contractual rights of policyholder-members of the mutual insurance company which, under the reserved power of amendment and state statute, converted from a mutual company to a stock company. A similar conversion of a mutual company to a stock company was upheld in *Grobe v. Erie County Mutual Insurance Co.*, supra.

In *Belden v. Union Central Life Insurance Co.*, supra, the Supreme Court of Ohio approved the conversion of a stock life insurance company into a mutual company pursuant to the reserved power of amendment and state statute. In *Schaffner v. Standard Boiler & Plate Iron Co.*, supra., the same court approved a plan of corporate recapitalization which, among other things, deprived preferred shareholders of the future right to cumulative preferred dividends which they had enjoyed prior to the recapitalization under the charter of their company.

Although the foregoing cases are distinguishable on their respective facts from the case at bar, it will be noted that in every one of these cases it was held that there was no constitutional objection to the exercise of the reserve power of amendment even though the amendment, in each instance, effected a radical, prospective change in pre-existing contract rights conferred by charter and by stock certificates or insurance policies. These cases are ample authority for the proposition that neither shareholders nor third persons claiming contractual rights under corporate charters have any constitutionally protected right to future surplus or profits of a corporation, where the state has reserved the power to amend such charters and has delegated that authority by statute to the members of a corporation. The decision of the court below in this case is in direct conflict with this well and long-established rule.

4. The lower court's decision in this case is of far reaching effect because, in erroneously extending the scope of the contract clause of the United States Constitution, the lower court has restricted, and to a large measure nullified, the reserved power of amendment provided for in the Ohio Constitution and delegated to the shareholders of Ohio corporations by Ohio statutes.

Petitioners respectfully point out to the Court, that the decision of the Court of Appeals not only affects the shareholders and 160,000 policyholders of Columbus Mutual and the right of the former to amend their corporate charter under Ohio law; but it will also have far reaching and disastrous effects on the right of shareholders of all other Ohio stock companies, and of the shareholders of stock companies of other states wherein a reserved power of amendment has been delegated to shareholders, to amend their corporate charters. For example, the usual Ohio stock life insurance company could not convert to a mutual company without

a 100% vote of its stockholders, despite the Ohio mutualization law. Furthermore, under the lower court's decision, an Ohio corporation, whose original charter provided for only one class of stock, could never amend its charter to increase the number of shares of that class, or to create other classes of stock such as cumulative preferred, unless every one of the original shareholders consented, because any such increase or creation of new classes of stock would necessarily diminish the aliquot interest of each of the original shareholders in the company's future earnings. By like token, it would, under the lower court's decision, be unlawful to amend a corporate charter so as to terminate the right of the holders of outstanding cumulative preferred shareholders to future cumulative preferred dividends not yet earned or accrued at the time of adoption of such an amendment. Yet all such prospective amendments are specifically authorized by Ohio statute, and in *Schaffner v. Standard Boiler & Plate Iron Co.*, supra, and in *Williams v. National Pump Co.*, supra, it was expressly held by, respectively, the Supreme Court of Ohio and the Ohio Court of Appeals, that cumulative preferred shareholders had no vested contractual right, by virtue of charter provisions, to dividends which, at the time of the adoption of the charter amendments involved therein, were not yet earned or accrued. Petitioners submit that the lower court's decision in the case at bar cannot be squared with these decisions of the Supreme Court of Ohio and of the Ohio Court of Appeals. It is no answer to say that in the latter, the Ohio statutes gave the dissenting shareholder a right to the fair market value of his shares, for as the Court of Appeals pointed out in its decision in this case, when the impairment of a vested right is involved "it is not a

question of degree, under the Constitution it is not to be impaired at all". It is to be emphasized, in the case at bar, that, as the lower court held, Columbus Mutual is not a mutual insurance company but a stock insurance company which writes some of its policies on the mutual plan. It necessarily follows that the company's policyholders are not stockholders, or members of the company. They are creditors of the company. *Belden v. Union Central Life Insurance Co.*, supra. As such, their rights in the company are governed primarily by the terms of their respective insurance contracts. It is important to note that the proposed amendment to Article V in no way affects or disturbs any of the terms or conditions contained in the insurance policies issued by Columbus Mutual to respondents and its other mutual plan policyholders.

Although this case involves an Ohio stock insurance company, it should be observed that the far reaching effect of the decision below extends not only to the right of shareholders to amend prospectively their corporate charters, but it also is authority for the nullification of the statutes of every state which authorize the conversion of a mutual life insurance company into a stock company. Under the decision below, any such conversion would necessarily operate as an unconstitutional impairment of vested policyholder rights unless every single policyholder-member consented thereto. The lower court's decison is thus in direct conflict with *In re Leininger*, supra and *Grobe v. Erie County Mutual Insurance Co.*, supra.

Such an application of the contract clause of the United States Constitution at the expense of constitutionally reserved power of the state to amend corporate charters constitutes a far reaching and revolutionary departure from existing law, and conflicts directly with the previously announced decisions of this Court and of the Supreme Court

of Ohio. *Wright v. Minnesota Mutual Life Insurance Co.*, supra, *Polk v. Mutual Reserve Fund Life Association*, supra, *Belden v. Union Central Life Insurance Co.*, supra, *Schaffner v. Standard Boiler & Plate Iron Co.*, supra.

CONCLUSION

To summarize, petitioner asks this Court to review but one narrow question. Petitioner does not ask this Court to review the decision of the lower court in holding that these policyholders have a vested beneficial third party contract interest in the entire surplus of Columbus Mutual, aggregating now some twelve million dollars, and also in the voluntary reserves aggregating now some seven million dollars in addition, all of which is the result of the successful management of this company by its Board of Directors elected by the stockholders, with which these policyholders had nothing whatsoever to do.

The single narrow question which we ask this Court to review is the ruling of the Court of Appeals affirming the District Court which enjoins any prospective amendment of Article V by the stockholders, thus vesting in these policyholders third party beneficiary contractual rights in future and as yet unearned profits, profits which if earned will be the result of efficient management in which these policyholders will have no voice and over which these policyholders will have no control whatsoever.

The unique aspects of Article V cannot obscure the far reaching effect of the lower court's decision on the state's reserve power of amendment.

Under the decision as it now stands on this single point, stockholders of any Ohio corporation may contract with the corporation so as to confer prospectively vested third party beneficiary contractual rights in any group of third parties, rights which do not arise out of contracts of such group

with the corporation and which may not be prospectively changed or impaired. If this decision is allowed to stand on this point, it is indisputable that stockholders of every Ohio corporation may contract with the corporation, as one of the direct parties to a two-party contract, so as to confer upon themselves prospectively vested contractual rights to future unearned profits of the corporation, thus substantially nullifying the Ohio Constitution's reserve power to amend corporate charters, and establishing direct authority for the substantial nullification of similar constitutional provisions of most if not every other state in the Union, which, since the decision in the *Dartmouth College* case, has reserved the power to amend corporate charters.

It is but rarely that this Court has presented to it a question for review of such far reaching import presenting a clash between the Federal Constitution and the constitution of most if not every state of the Union.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Filed December 4, 1958]

This cause came on to be considered upon cross-motions for summary judgment filed herein by the original parties to the Clark case on April 1, 1958. Counsel for the plaintiffs, Clark et al. and for defendants, Ohio State Life et al., are agreed that there is no genuine issue as to any fact material to a decision on cross-motions, and that judgment should be entered as a matter of law; but there agreement ends. Each side claims entitlement to such judgment.

Upon agreement of all counsel, the motion of the Superintendent of Insurance of the State of Ohio for leave to intervene was sustained. The intervenor while not joining in either motion takes the position that one or the other of the motions for summary judgment should be granted, intervenor's interest being confined to the application of the insurance laws of the State of Ohio.

The motions of plaintiffs in Civil No. 5149, Keller et al. v. Ted W. Brown et al., to have that case consolidated with Civil No. 5146, the Clark case, and to be joined as moving parties on the summary judgment issue having been sustained, the Keller case plaintiffs are aligned with plaintiffs in the Clark case, and they ask that summary judgment be granted as a matter of law in favor of all plaintiffs.

The Court having carefully considered this matter, the voluminous and able briefs filed, and after numerous hear-

ings, and being fully advised in the premises, finds as counsel have agreed that there is no genuine issue as to any material fact and that judgment should be granted as a matter of law.

The basis for this litigation is quite apparently the surplus accumulated by The Columbus Mutual Life Insurance Company, and decision of the question of ownership of those funds between stockholders on the one hand or policy holders on the other, is dispositive of this action.

In the case of United States Life Insurance Co. v. Spinks, 126 Ky., 405, 422, the court had this to say in defining "surplus" and fixing its ownership:

> "The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of 'surplus.' This fund is sometimes called, or miscalled 'undivided profits' or 'surplus earnings' or the like. But it represents only the aggregate of overcharges of premiums assessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company from its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all 'surplus' or 'profits' would belong to the stockholders. It would represent that such more charged for doing the business than it cost, and would be properly profit. But, where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it * * * In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent that shall be paid in

> dividends to the stock, the residue of 'surplus' or 'net earnings' going to the contributing policy holders. * * * The 'surplus' was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and for maintaining the reserves. Hence, this 'surplus' should be treated as if the company were purely a mutual company."

The Court is of the opinion that the application of the above-quoted language to the instant case will accomplish a fair, just and equitable result. It is certainly clear that Columbus Mutual is not "only a stock company" nor is it "a purely mutual company." The nature of its entity lies somewhere in between, and can be best described, perhaps, as one of the so-called "mixed companies." However, it is immaterial how the entity is characterized, since it is not "only a stock company." Because of the restrictions placed upon the stock of Columbus Mutual in its articles of incorporation and printed upon the face of issued stock certificates, the Court is of the opinion that the principles of the Spinks case, supra, should apply. "Hence, this 'surplus' should be treated as if the company were purely a mutual company," and the surplus "should in equity go to those who had contributed it." This result affords a fair, reasonable and unstrained construction to the language of Article V of Columbus Mutual's articles of incorporation "* * * the suplus of the company shall belong to the holders of policies on the mutual plan, * * *." The Court is of the opinion that the equitable ownership of the surplus of Columbus Mutual under the Articles is vested in its policy holders on the mutual plan, that is, in the class of which these plaintiffs are representatives; is the aggregate they are entitled to the whole.

Based upon the foregoing, and upon the entire files and records in this consolidated action, the Court finds that

defendants' motion for summary judgment is not well taken and should be and hereby is overruled.

The Court further finds that plaintiffs' motion for summary judgment is well taken and should be and hereby is sustained and judgment should be entered for plaintiffs and against defendants as a matter of law.

However, pursuant to the request of the intervenor, Superintendent of Insurance of the State of Ohio, contained in his memorandum filed May 2, 1958, the Court will withhold the entry of final judgment herein until all parties have had an opportunity to be heard on the propriety of remedies to be granted to the plaintiffs.

/s/ Underwood
District Judge

SUPPLEMENTAL OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Filed March 16, 1959]

On December 4, 1958, the Court entered its memorandum opinion and order upon the cross-motions for summary judgment then pending herein. In that order, the Court overruled defendants' motion for summary judgment and sustained the summary judgment motion of the plaintiffs in the Clark case, Civil No. 5146, in which motion the plaintiffs in the Keller case, Civil No. 5149, had previously been permitted to join as moving parties. Also in its opinion and order of December 4, 1958, the Court acting pursuant to the request of the intervenor, the Superintendent of Insurance of the State of Ohio, withheld the entry of final judgment herein so that all parties might have an opportunity to be heard on the propriety of remedies to be granted.

However, at a hearing held in open court on January 9, 1959; notice thereof having been given and counsel for all parties being present, the aforementioned request of the intervenor was withdrawn.

Now, therefore, this matter is before the court for consideration of the final judgment to be entered herein, and the Court being fully advised in the premises finds as follows:

(a) That the plaintiffs in the Clark case, Civil No. 5146, are mutual plan policyholders of The Columbus Mutual Life Insurance Company and bring said action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure on behalf of themselves and all other mutual plan policyholders of said company;

(b) That the Keller case, Civil No. 5149, was similarly brought as a class action pursuant to said Rule 23(a) by the plaintiffs Keller, Purvis and Johnston, later joined by the plaintiffs Eberst and Strunk;

(c) That the Court has jurisdiction of the parties and the subject matter of this consolidated action wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between citizens of different states; and that there is no just reason to delay the entry of final judgment herein.

Based upon the foregoing and upon the memorandum opinion and order entered December 4, 1958, which opinion and order shall be considered with this supplemental opinion and order as the final judgment of the Court, all of which shall be effective from the date hereof, it is ordered, adjudged and decreed that summary judgment be and it hereby is entered in favor of the plaintiffs and against the defendants, and therefore the Court does hereby declare as follows:

(1) That the surplus of The Columbus Mutual Life Insurance Company belongs to its mutual plan policyholders,

subject only to the limited rights of its stockholders to receive dividends not to exceed 10% per annum on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement.

(2) That The Ohio State Life Insurance Company and the individual defendants who are stockholders of The Columbus Mutual Life Insurance Company cannot exercise their voting power to relieve their stock of the restrictions and limitations of Article V of the charter of Columbus Mutual to which restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock; and

(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law if the proposed amendment were permitted.

In addition to the foregoing declarations, the Court is of the opinion that injunctive relief herein is warranted upon the facts admitted in the pleadings and upon the findings of the Court and the agreement of all counsel that there is no genuine issue as to any material fact. The Court is of the further opinion that Rule 52 of the Federal Rules of Civil Procedure, to the extent that it applies herein, has been sufficiently satisfied without necessity for further findings.

Therefore, it is ordered, adjudged and decreed that the defendants, The Ohio State Life Insurance Company, the Columbus Mutual Life Insurance Company, Frederick E. Jones, Frank L. Barnes, I. Malcolm McCampbell, Thomas F. Boss, David C. Morgan, Howard W. Kraft, Derrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Frank A. Burgess, Stanton G. Prentiss, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer, Edward A. Sauer, Charles F. Brany, W. Lyman Case, Ben F. Hadley, Donald J. Hoskins, Carl Mitcheltree, Donald C. Power, Jay Show Sr., and Danforth

E. Ball Jr., and Ted W. Brown, Secretary of State of the State of Ohio, and each of them, and their agents and servants and all others acting in their aid or assistance or conjunction, or in aid or conjunction of or with any of them, are hereby perpetually enjoined and restrained from:

(A) Taking any action to make effective the proposed amendment to Article V of the Charter of The Columbus Mutual Life Insurance Company; or

(B) Taking any action in derogation of the terms of said Article V as now constituted contrary to the rights of the plaintiffs under said Article V as such rights are declared herein.

It is further ordered, adjudged and decreed that the Court does hereby retain jurisdiction of this consolidated action for all necessary purposes, including modification of the aforesaid injunctive order, if warranted; consideration of plaintiffs' requests that they be awarded their costs and disbursements, including reasonable attorney fees; and all other ancillary or remedial matters that may arise.

Settlement of judgment entry hereof not required.

/s/ Underwood
District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Before: McAllister, chief judge, Miller, circuit judge, and Brooks, district judge.

MILLER, Circuit Judge. This declaratory judgment action was brought by the appellees on behalf of themselves as mutual plan policyholders of The Columbus Mutual Life Insurance Company and on behalf of The Columbus Mutual Life Insurance Company itself, hereinafter called

Columbus Mutual, and on behalf of all mutual plan policyholders of that company against the appellant, Ohio State Life Insurance Company, hereinafter called Ohio State, and directors, officers and stockholders of both companies. It involves the conflicting claims of the mutual plan policyholders of Columbus Mutual and the stockholders of that company, including its principal stockholders, Ohio State, to the beneficial ownership of the surplus of Columbus Mutual, which, together with certain reserves and net profits for the year 1957, totaled as of December 31, 1957, $49,184,658.66. Jurisdiction is based upon the amount involved and because of diversity of citizenship and because the action arises under the Constitution of the United States. The District Judge found in favor of the mutual plan policyholders, from which ruling this appeal was taken.

The facts are not in dispute. Columbus Mutual is a legal reserve life insurance company, organized in 1906 under the laws of Ohio as a stock insurance company, with an authorized capital of $100,000.00 divided in 1,000 shares of $100.00 par value each. The original articles were amended by the company's shareholders to increase the company's authorized capital stock in the years 1910, 1913, 1920, 1921 and 1922. The company's present authorized capital is $500,000.00, divided in 5,000 shares of $100.00 par value each, all of which are issued and outstanding. Except for these increases of capital stock there have been no other amendments to the Columbus Mutual charter.

Columbus Mutual has been a well managed and successful life insurance company. As of December 31, 1957, it had approximately 160,000 policyholders who owned insurance in force in the amount of $479,919,138.00. As of that date the company's total assets were valued at $134,883,105.00. The business of the company has been managed and directed by a Board of Directors elected by the

company's shareholders, as provided in Article VI of its charter. The company's policyholders have never had a voice in either the election of the directors or officers, or in the management of the company's business. Since it commenced business in 1906 there have been approximately 500,000 holders of its insurance policies, of which some 160,000 own policies which are currently in force.

Under Article III of its charter, Columbus Mutual is authorized to write policies of insurance "on both the mutual and stock plan." The company has written policies on the "mutual plan" primarily. Mutual plan policies are "participating" policies in that the terms of such policies expressly provide that such policies are entitled to share in the profits of the company to the extent that such profits are apportioned from time to time to the respective mutual plan policies by the company's Board of Directors. "Stock plan" policies contain no such participation clause.

Article V of the Columbus Mutual charter is as follows:

> "Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and; provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.
>
> "Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment

of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

"When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter."

Each policy issued by Columbus Mutual has contained a provision to the effect that the policy constitutes the entire contract between the company and the policyholder. Each mutual plan insurance policy issued by the company has contained a provision to the effect that such policy is entitled to share in the divisible surplus of the company as apportioned or determined by the company.

Ohio State is a legal reserve stock life insurance company, organized in 1906 under the laws of Ohio. Ohio State has prospered so that as of December 31, 1957, it had insurance in force in the amount of $384,955,905.00 and total assets of $88,614,777.00. As of that date its unassigned surplus amounted to almost $5,000,000.00.

During the year 1956 Ohio State acquired 4,977, or 99.54%, of the 5,000 authorized and outstanding shares of Columbus Mutual. It acquired this stock for $6,470,100.00, being at the rate of $1,300.00 per share. It acquired this Columbus Mutual stock for the avowed purpose of merging the two companies into a single large life insurance

company of almost double the number of policyholders than was possessed by either of the companies alone, and possessed of sufficient assets and breadth of insurance coverage to insure greater protection to all policyholders, and to enable it to compete on favorable terms with other large insurance companies in the United States.

For the purposes of the merger and in order that Columbus Mutual might prospectively conduct its business in conformity with the method of business of Ohio State, the shareholders of Columbus Mutual, including Ohio State, have attempted since November, 1956, to amend Article V of the Columbus Mutual charter. The proposed amendment of Article V has been regarded by certain shareholders of Columbus Mutual as an attempt to raid the surplus of Columbus Mutual to the detriment of that company and its policyholders. Although Ohio State and other stockholders have vigorously denied this charge, they considered it advisable in the interest of public relations to abandon various proposed amendments to Article V and to finally propose the amendment which is now in issue.

The proposed amendment to Article V provides in substance that (1) the unassigned surplus as of December 31, 1956, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company, and no dividends to any stockholders of the company shall be payable therefrom; (2) annually, for a period of twenty-five (25) years, there shall be added to this special surplus from the earnings of the company a sum equal to the net earned interest rate on the mean invested assets after all taxes based on income; (3) regular dividends shall be paid from the earnings of the company to all participating policyholders without distinction, and additional dividends may be paid out of the

special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of the amendment; (4) in the event of dissolution and liquidation at any time so long as any participating policies of the company in force on the effective date of the amendment are then in force, such policyholders shall be entitled to distribution from such special surplus, as then existed, in amounts representing their percentage interest in such surplus at the time of the effective date of the amendment; and (5) at the maturity of the last participating policy in force on the effective date of the amendment, the special surplus, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to shareholders, except out of surplus over the above such amount.

This proposed amendment was adopted by Columbus Mutual shareholders on October 28, 1957, and was submitted to the Secretary of State of Ohio for filing. The Attorney General of Ohio approved the amendment but advised the Secretary of State to refuse to record it because of the legal objections raised by the appellees and in order that the rights of the appellees and other policyholders could be adjudicated in the Supreme Court of Ohio.

The Secretary of State refused to record the amendment. Appellants brought an original action in mandamus in the Supreme Court of Ohio for a writ compelling the Secretary of State to file the amendment. On February 11, 1958, the Supreme Court of Ohio refused to consider the merits of the case and denied the writ on technical grounds, not necessary to be here considered. See: *State ex rel. The Columbus Mutual Life Ins. Co. v. Brown, Secy.*

of State et al., 167 O. S. 309. While the amendment was pending in the Supreme Court of Ohio appellees commenced this action in the District Court.

The judgment entered in the District Court held that the surplus of Columbus Mutual belonged to its mutual plan policyholders subject to the limited rights of the stockholders to receive dividends not to exceed 10% per annum on the par value of the stock and to receive $200.00 per share for their stock upon its retirement; that the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus if the proposed amendment was permitted; and enjoined the appellants from taking any action to make effective the proposed amendment of Article V.

As will be recognized from the foregoing recital, the issues involved in this case are what rights, if any, the mutual plan policyholders of Columbus Mutual have in the surplus of that company by reason of provisions of Article V of the company's charter, and whether or not the stockholders of Columbus Mutual, including Ohio State, have the right to amend Article V as they have attempted to do so.

Counsel for the respective parties have by oral argument and very thorough briefs ably discussed many legal principles involved in this controversy. However, it is readily admitted by them that basically the problem is not a complex one after certain legal principles, which are well established in corporate and insurance law, are recognized and accepted. We believe that a statement of these principles at this time will materially aid in presenting the real issue, which can then be disposed of.

There is a fundamental difference between a corporate insurance company with stockholder ownership, doing business as a stock company, and a mutual insurance com-

pany without capital stock, doing business on the mutual plan. In the first type of case the corporation is owned and managed by the stockholders, who need not be policyholders, the corporation is operated for the purpose of profits for the stockholders and the beneficial ownership of the profits and surplus is in the stockholders. General principles of corporate law control the rights of stockholders. The rights of policyholders are controlled by their policies of insurance and any applicable statutory provisions. In the second type of case the company is owned and managed by the policyholders and the business is conducted for the benefit of the policyholders. The beneficial ownership of the profits and surplus is in the policyholders. *Huber* v. *Martin*, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 664; *United States Life Ins. Co.* v. *Spinks*, 126 Ky. 405, 422, 96 S. W. 889, 894. However, it is also possible for an insurance company to be organized as a stock corporation with stockholders, which not only does business as a stock company, but also issues policies on the mutual plan. *Ohio Farmers Indemnity Co.* v. *Commissioner*, 108 F. (2) 665, 667, C. A. 6th; *Hutchins Mutual Ins. Co.* v. *Hazen*, 105 F. (2) 53, 57, C. A. D. C. It is this so-called "mixed company" which presents the problem of whether the beneficial ownership of the profits and surplus is in the stockholders or policyholders.

Although there was absence of statutory authority in Ohio to create a non-stock mutual insurance company, this did not preclude a stock insurance company, legally organized in Ohio, from issuing policies on the mutual plan. *Sections 3587, 3588, Revised Statutes* (1906). See: *Ohio ex rel. National Life Assn.* v. *Matthews*, 58 O. S. 1, 7-9; *Royal Trust Co.* v. *Equitable Life Assurance Society*, 247 F. 437, 438-439, C. A. 2nd; *Connecticut General Life Ins. Co.* v. *Eaton*, 218 F. 188, 200-201, affirmed, 233 F. 1022.

C. A. 2nd. It is immaterial whether the term "mixed company" is properly or improperly applied to them. In substance, it is a stock company which issues some of its policies on the mutual plan. *Equitable Life Assurance Society* v. *Bowers*, 87 F (2) 687, 690, C. A. 2nd. Columbus Mutual was a company of this kind, a stock company with authority under Article III of its charter to issue policies on the mutual plan. In such a company, the stockholders have certain rights as stockholders and the policyholders on the mutual plan have certain rights as policyholders.

It does not necessarily follow that since Columbus Mutual was a stock corporation, its assets, including surplus, were legally owned by its policyholders, to the exclusion of any interest therein by the policyholders on the mutual plan, with the result that the stockholders could deal with the surplus without obtaining the consent, and over the objections, of the policyholders. While this might be true as a general principle of corporate law in the absence of any contract to the contrary, it is settled law that a corporate charter is both a contract between the corporation and the state and a contract between the corporation and its stockholders. *Allen v. Scott*, 104 O. S. 436, 439; *Opdyke* v. *Security Savings & Loan Co.*, 157 O. S. 121, 132, 134. The rights which a stockholder would have in the absence of restrictive provisions in the corporate charter, can be restricted or limited by the provisions of the charter, which become part of the contract when the stock is purchased and issued to him. *Bell* v. *Union Central Life Ins. Co.*, 14 O. C. C. (N. S.) 385, affirmed without opinion, 92 O. S. 522; *Royal Trust Co.* v. *Equitable Life Assurance Society*, supra, 247 F. 437, 441, C. A. 2nd. In the present case, the provisions of Article V control the extent to which the usual rights of the stockholders have been curtailed.

We have no difficulty in determining from a reading of Article V of the corporate charter of Columbus Mutual the extent to which the usual rights of stockholders have been restricted. Although the stockholders have the right to elect directors and retain the right to operate and manage the company, their proprietary rights in the assets of the company are limited to dividends at the rate of 10% per annum on the par value of the stock, to the payment of $200.00 per share in the event of the retirement of the stock, and to have returned to them the amounts paid to the company for the stock over and above the par value of the stock subscribed. This, together with the additional provisions providing for later reorganization into a mutual company, would carry the clear implication that the stockholders have no additional interest in the earnings and surplus of the company. The language of this portion of Artiel V is unambiguous. Although it does not specifically state in whom the beneficial interest in the surplus is vested, it is a limitation on the rights of the stockholders. *Royal Trust Co.* v. *Equitable Life Assurance Society*, *supra*, 247 F. 437, 441, C. A. 2nd.

If more is needed to reach that conclusion, appellees rely upon the additional sentence in Article V reading, "Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, *the surplus of the company shall belong to the holders of policies on the mutual plan*, and shall be apportioned and distributed on such equitable plan as the directors may provide." (Emphasis added.) They contend that this provision not only deprives the stockholders of any beneficial interest in the surplus, but vests such beneficial interest in the policy-

holders. The proper construction to be given to this provision in Article V is the real issue in the case.

Appellants contend that the words "Subject, however, to" mean "conditional upon" or "dependent on" or "provided that", with the result that the surplus "shall belong to the holders of policies on the mutual plan" *only when and if* the three conditions therein enumerated have been complied with. Only one of these conditions has been fulfilled, namely, the return of the paid-in surplus to shareholders. In support of this construction they rely upon the use of the future tense in the words "the surplus * * * *shall* belong." Cases are cited by appellants which hold that under certain circumstances the words are properly so construed. There are other cases cited by appellees which hold that the words mean "subservient to" or "charged with" as in the case of the conveyance of real estate subject to a mortgage. We believe that the meaning to be given to the words must be the one which carries out the intent of the parties as determined by the circumstances under which the contract was made. *Roosevelt Materials Co.* v. *Nolan Brothers, Inc.*, 264 F. (2) 807, 809, C. A. 10th; *Prudential Insurance Co. of America* v. *Nelson*, 101 F. (2) 441, 444, C. A. 6th.

Article V looked to the future reorganization of the Columbus Mutual into a mutual company. Since its organization in 1906 it has operated chiefly in writing insurance upon the mutual plan. It has described itself in its corporate name as a mutual company. Consistent with this purpose, it has materially limited the rights of its stockholders to participate in the earnings and profits. All of this clearly indicates an intent on the part of the incorporators to preserve for the policyholders on the mutual plan the profits and surplus of the company after the limited payments to the stockholders. It would be most

inconsistent to say that the stockholders were limited in their rights in the profits and surplus as hereinabove pointed out, but were nevertheless not so limited because the company had not been reorganized into a mutual company. On the other hand, it appears logical to hold that if the stockholders are not entitled to the beneficial interest in the surplus it remains in the company for the use and benefit of the policyholders on the mutual plan. The use of the words "the surplus * * * shall belong" to policyholders is not inconsistent with this construction. When the company was organized there was no surplus; the surplus referred to was to be accumulated in the future. When and as accumulated it would belong to the policyholders. The words used reflect that thought.

It is not necessary that the policyholders be parties to this contract between the corporation and its stockholders. It is the general rule both in Ohio and elsewhere that one for whose benefit a contract is made may maintain an action upon it. *Union Savings & Loan Co.* v. *Cook*, 127 O. S. 26, 33; *Rhorbacker* v. *The Citizens Building Association Co.*, 138 O. S. 273, 276; *Restatement, Contracts, Sections 135, 139.*

We construe Article V as giving to the policyholders on the mutual plan a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein. *Bell* v. *Union Central Life Insurance Co.*, supra, 14 O. C. C. (N. S.) 385, affirmed without opinion, 92 O. S. 522; *Restatement, Contracts, Sec. 142.*

This ruling does not mean that the mutual plan policyholders are entitled to receive from the surplus as dividends on their policies more than is provided by the terms of the policies. As policyholders their rights are controlled by the provisions of their policies. Under their policies their rights in the surplus are limited. *Equitable*

Life Assurance Society v. *Leyoch*, 213 U. S. 25, 47; *State ex rel. Ellis* v. *Union Central Life Insurance Co.*, 43 O. C. C. (N. S.) 49, affirmed, 84 O. S. 459. But, in addition to their rights under the policies, they have certain proprietary rights in the surplus acquired by reason of the provisions of Article V. The cases relied upon by appellants which construe policyholders' rights under policy provisions are not controlling in a case where, as here, we are construing a policyholders' rights acquired through a provision of the corporate charter.

Nor does the ruling mean that the mutual plan policyholders are entitled to have the surplus divided between them at the present time, free from the control of the directors. We are here dealing with the beneficial interest in the surplus, a proprietary right, not the right of possession and distribution. Their claim is that they are entitled to have their beneficial interest in the surplus preserved in its present status for their benefit as mutual plan policyholders.

We recognize that in Ohio, as elsewhere, there is a reserved statutory power under which the charter of a corporation can be subsequently amended without violating the sanctity of the contract between the state and the corporation. *Belden* v. *The Union Central Life Ins. Co.*, 143 O. S. 329, 341; *Dodge* v. *Security Savings & Loan Co.*, supra, 157 O. S. 121. But, this does not include the right on the part of the state, acting through the stockholders of the corporation, to amend the charter retroactively in a way which will impair vested rights previously acquired under a contract between the corporation and parties other than stockholders. *Coombes* v. *Getz*, 285 U. S. 434, 441-442; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657; *Wheatley, Trustee*, v. *The Ar-I-Root Co.*, 147 O. S. 127; *Schaffner* v. *The Standard Boiler & Plate*

Iron Co., 156 O. S. 454, 461; *Partridge v. Michigan Mutual Windstorm Ins. Co.*, 256 Mich. 76, 80.

Nor is this conclusion contrary to the provisions of Sec. 3915.05, Ohio Revised Code, which provides that the policy and the application therefor shall constitute the entire contract between the parties, or contrary to the provisions of Sec. 3911.29, Ohio Revised Code, which provides that no person shall receive from any company any special favor in the dividend or any valuable consideration or inducement not specified in the policy of insurance. Those statutory provisions relate to the rights of the parties under the contract of insurance, involving such things as the parties insured, the insurance premium, cash surrender and loan values, notice of claim and proof of loss, and facts giving rise to cancellation or forfeiture. A holder of a policy issued on the mutual plan has rights both as an insured under the policy and as a co-owner of the assets of the company. Such statutes have no application to the proprietary rights of such a policyholder in the company. *Kentucky Growers Ins. Co. v. Logan*, 149 Ky. 453, 454, 149 S. W. 922, 923; *Jaque v. Aetna Life Ins. Co.*, 123 Ky. 510, 520; *Reserve Loan Ins. Co. v. Krammer*, 83 Ind. App. 584, 146 N. E. 876; *1 Couch, Cyclopedia of Insurance Law*, (1929 Ed.) 281, Sec. 139.

The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; under the Constitution it is not to be impaired a all. *Bank of Minden v. Clement, Admx.*, 256 U. S. 126. In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation

running to the appellees. *Bell v. Union Central Life Ins. Co.*, supra, 144 O. C. (N. S.) 385, affirmed 92 O. S. 522; *Huber v. Martin*, supra, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653; *Royal Trust Co. v. Equitable Life Assurance Society*, supra, 247 F. 437, C. A. 2nd; *Schaffner v. The Standard Binder & Plate Iron Co.*, 150 O. S. 454.

The judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ Shackelford Miller, Jr.,
United States Circuit Judge.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SIXTH CIRCUIT DENYING REHEARING

[Filed March 23, 1960]

Appellants' petition for rehearing and appellees' response therefore, having been considered by the Court;

It is ordered, that the petition for rehearing be denied.

Approved for entry:

s/ Shackelford Miller, Jr.,
United States Circuit Judge.

ARTICLES OF INCORPORATION OF THE COLUMBUS MUTUAL LIFE INSURANCE COMPANY

These Articles of Incorporation of The Columbus Mutual Life Insurance Company.

Witnesseth, that we, the undersigned, hereby agree and declare our intention to form a corporation under the laws of the State of Ohio for the purpose hereinafter set forth, and we hereby adopt as the charter for said corporation the regulations and provisions following, as provided in Chapter 10, Division II, Title II, Part Second, of the Revised Statutes of Ohio, to-wit:

Charter.

First. The name of said corporation shall be The Columbus Mutual Life Insurance Company.

Second. Said corporation is to be located at the City of Columbus, in Franklin County, Ohio.

Third. Said corporation is formed for the purpose of making insurance on the lives of individuals, and every insurance appertaining thereto and connected therewith, making insurance against accidents to persons and sickness and temporary and permanent physical disability, and granting, purchasing, and disposing of annuities, on both the mutual and stock plan, and for all purposes incidental or necessary thereto.

Fourth. The capital stock of said corporation shall be one hundred thousand dollars ($100,000.00), divided into one thousand (1000) shares of the par value of one hundred dollars ($100.00) each, which shall be subscribed for, accepted and taken, and shall be fully paid, before commencing business.

Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate

of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.

Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter.

Sixth. The corporate powers and business of the company shall be exercised, conducted and controlled, and the property managed by a board of directors, consisting of not less than twelve nor more than the number at any time authorized by law and as may from time to time be fixed by the by-laws of the company. At the first election of directors one-third of the directors shall be elected to serve until the next annual meeting, one-third shall be elected to serve until the second annual meeting, and one-third shall be elected to serve until the third annual meeting, and thereafter one-third of such directors shall be elected at such annual meeting to serve for three years and until their successors shall be elected and qualified. Vacancies in the board of directors, from any cause, shall be filled by directors.

The board of directors shall elect from among their number a president and one or more vice-presidents, and shall also elect a secretary and a treasurer, and may appoint such other officers and agents as may from time to time be provided in the by-laws of the company, or as may be deemed proper by the directors, all of which officers and agents shall at all times be subject to the direction and control of the board of directors and shall be subject to removal by the directors at any time.

A majority of the board of directors and other officers of the company by a majority of the stockholders present, except that in case of a vacancy the same shall be filled as provided above for such cases; and the officers of the company shall be elected by the board of directors at their first meeting after their election in each year, except that in case of a vacancy in any office, the same shall be filled in the manner as is provided for filling a vacancy in the office of director.

Reports showing the business and condition of the company shall be made by the directors to the stockholders at the annual meetings.

Seventh. The annual meeting of the company shall be held at the office of the company in the city of Columbus, Ohio, at such time as may be fixed in the by-laws of the company. Reasonable notice of all meetings of stockholders shall be given, by mail or publication, or as may from time to time prescribed by the directors.

time to time be prescribed by the directors.

In witness whereof, we hereunto set our hands, this seventh day of November A. D. 1906.

John M. Sheets,
Stephen A. Court,
John R. Hurst,
C. W. Brandon,
W. B. Carpenter,
F. A. Reeder,
Chas. M. Peters,
J. E. Beery,
D. H. Thomas,
H. C. Crum,
C. F. Luthy,
Albert G. Joyce,
S. C. Priest,
Emil Kiesewetter,
Geo. A. Peters.

Department of Attorney General

Columbus, Ohio, November 8, 1906

I hereby certify that I have examined the articles of incorporation of the Columbus Mutual Life Insurance Company to be located at the city of Columbus, Franklin county, Ohio, and that the same are in accordance with the provisions of Chapter X, Title II, Division II, Part Second.

of the Revised Statutes of Ohio, and that the same are not inconsistent with the constitution and laws of the United States and of this state.

Wade H. Ellis,
Attorney General.

Certificate of Increase of Capital Stock

C. W. Brandon, President, and Geo. M. Peters, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises, and acting on behalf of said company, do hereby certify that the twelfth day of February, A.D. 1910, the capital stock of said company having theretofore been fully subscribed and paid up, by a vote of the holders of the majority of the capital stock of said company, at a meeting called by a majority of its directors, and held at the office of the company in the Wyandotte Building, in the City of Columbus, Franklin County, Ohio, and at which meeting the holders of 667 shares of the capital stock of said company were present in person or by proxy pursuant to notice therefor by letter to each of the stockholders and by publication as requested by Section 3262 of the Revised Statutes of Ohio, it was on motion "Resolved, that the capital stock of The Columbus Mutual Life Insurance Company, be increased from one hundred thousand dollars, ($100,000.00) its present capital stock to one hundred and twenty-five thousand dollars ($125,000.00) divided into twelve hundred and fifty (1250) shares of one hundred dollars ($100.00) each, and that such additional stock be issued and disposed of, at such times, and at such prices, as shall be determined by the executive committee; and that the president and secretary be, and they hereby are, instructed to file a certificate of such increase with the Secretary of State," which is done accordingly.

In witness whereof, the aforesaid C. W. Brandon, President and Geo. A. Peters, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands, this twenty-first day of February, A.D. 1910.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

Geo. A. Peters,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

C. W. Brandon, President and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises, and acting on behalf of said company, do hereby certify that on the tenth day of August, 1912, by a vote of the holders of the majority of the capital stock of said company at a meeting called by a majority of the directors for that purpose and held at the office of the company, in the City of Columbus and County of Franklin, Ohio, and at which meeting the holders of a majority of the capital stock of said company were present in person or by proxy, thirty days' notice of the time, place and object of which meeting having been given by publication in the Ohio State Journal, a newspaper of general circulation and by letter addressed to each stockholder of said company at his usual place of residence, as required by law, agreed in writing to the increase of the capital stock hereinafter set forth, and it was on motion resolved that the capital stock of The Columbus Mutual Life Insurance Company be increased from $125,000.00, its present capital stock, to $150,000.00, divided into 1500 shares of $100.00 each. And it was further resolved that the presi-

and secretary of said company be instructed to file a certificate of such increase with the Secretary of State, which is hereby accordingly done.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands this fifteenth day of July, A.D. 1913.

The Columbus Mutual Life Insurance Company,
By C. W. Brandon,
President.
D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock.

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify, that on the tenth day of August, 1912, the authorized capital stock of said company having been fully subscribed for and fully paid up, on said day, by a vote of the stockholders of the majority of all the stock of said company, at a stockholders' meeting called for that purpose, by a majority of the board of directors, held at the office of the company in the City of Columbus, Franklin County, Ohio, due notice of which meeting was given according to law, it was, on motion resolved that the capital stock of said company be increased as hereinafter set forth, and it was further resolved that a certificate of such increase should be filed with the Secretary of State, and said stock sold at such time as the board of directors of said company should de-

termine, and that pursuant to said authority by a unanimous vote of the board of directors held at the office of the company in the City of Columbus, Ohio, on the thirteenth day of July, 1920, it was resolved that the president and secretary be authorized and directed to file a certificate of said increase of the capital stock of said company, from one hundred and fifty thousand ($150,000) dollars, its present capital stock, to two hundred thousand ($200,000) dollars, the increase to be divided into five hundred shares of one hundred ($100.00) dollars each.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands this third day of September, 1920.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

D. E. Ball,
Secretary.

[Seal].

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify, that on the seventeenth of January, 1921, the authorized capital stock of said company having been fully subscribed for and fully paid up, at the annual meeting of the board of directors, on said day at the office of the company, the following resolution was unanimously adopted:

Whereas, in the opinion of the board of directors, the company requires a larger amount of capital stock than its present capital of $200,000.00.

And whereas, authority for so doing has been conferred by resolution of the stockholders, more than two-thirds of the holders of said capital stock concurring therein.

Now, therefore, be it resolved, that the capital stock of the company be increased from $200,000.00 par value to $250,000.00 par value, and that a certificate of such increase be filed by the president and secretary, with the Secretary of State of Ohio, as provided by law.

Said increase of stock to be divided into 500 shares, of $100.00 each.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto subscribed their names and have caused the seal of the company to be hereunto affixed this twenty-fourth day of May, 1921.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify that on to-wit, January 16, 1922, by a unanimous vote of the board of directors, held at the office of the company in the city of Columbus, Ohio,

on the said date, having been authorized so to do by the stockholders of the company owning more than two-thirds of the capital stock herein, as provided in Section 9345 G. C. of Ohio, it was resolved that the capital stock of the company be increased from two hundred fifty thousand ($250,000) dollars to three hundred thousand ($300,000) dollars, and that the president and secretary be authorized and directed to file a certificate of such increase of the capital stock of the company from two hundred fifty thousand ($250,000) dollars its present capital stock to three hundred thousand ($300,000) dollars, the increase to be divided into 500 shares of $100.00 each.

In witness whereof, the said C. W. Brandon, president, and D. E. Ball, secretary of the Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have subscribed their names and affixed the seal of the company hereto this eighteen day of January, 1922.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

By D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify that on to-wit, January 16, 1922, by a unanimous vote of the board of directors, held at the office of the company in the city of Columbus, Ohio, on the said date, having been authorized so to do by the stockholders of the company owning more than two thirds

of the capital stock therein, as provided in Section 9345 G. C. of Ohio, it was resolved that the capital stock of the company be increased from three hundred thousand ($300,000) dollars to five hundred thousand ($500,000) dollars, and that the president and secretary be authorized and directed to file a certificate of such increase of the capital stock of the company from three hundred thousand ($300,000) dollars its present capital stock to five hundred thousand ($500,000) dollars, the increase to be divided into 2000 shares of $100.00 each.

In witness whereof, the said C. W. Brandon, president, and D. E. Ball, secretary, of the Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have subscribed their names and affixed the seal of company hereto this ..... day of April, 1922.

By C. W. Brandon,
President.

By D. E. Ball,
Secretary.

[Seal]

United States of America, State of Ohio, Office of the Secretary of State.

I, Ted W. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the These Articles of Incorporation of The Columbus Mutual Life Insurance Company, location Columbus, Ohio, filed on the seventeenth day of November, 1906, recorded in Vol. 120, page 458.

Certificate of Increase, filed on the twenty-third day of February, 1910, recorded in Vol. 121, page 679.

Certificate of Increase, filed on the fifteenth day of July, 1913, recorded in Vol. 174, page 23.

Certificate of Increase, filed on the seventh day of September, 1920, recorded in Vol. 250, page 204.

Certificate of Increase, filed on the eighth day of July, 1921, recorded in Vol. 269, page 346.

Certificate of Increase, filed on the twentieth day of January, 1922, recorded in Vol. 275, page 522.

and

Certificate of Increase of The Columbus Mutual Life Insurance Company, filed on the sixth day of April, 1922, recorded in Vol. 279, page 566, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this twenty-fourth day of October, A. D. 1957.

Ted W. Brown,
Secretary of State.

[Seal]

Certificate of Amendment of October 28, 1957 to Articles of The Columbus Mutual Life Insurance Company

Frank L. Barnes, First Vice President, and Orval J. Miller, Secretary of The Columbus Mutual Life Insurance Company, an Ohio corporation, with its principal office located at 303 East Broad Street, Columbus, Ohio, do hereby certify that a meeting of the holders of the shares of said corporation entitling them to vote on the proposal to amend the articles of incorporation thereof, as contained in the following resolution, was duly called and held on the twenty-eighth days of October, 1957, at which meeting a quorum of such shareholders (and each class thereof) was present in person or by proxy, and that by the affirmative vote of the holders of shares entitling them to exercise 99.54% of the voting power of the corporation on such proposal the following resolution was adopted to amend the articles:

Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, has acquired 4,977 out of 5,000, or 99.54%, of the shares of The Columbus Mutual Life Insurance Company, both companies being stock companies writing policies primarily on the participating or mutual plan, and

Whereas, The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investment in securities on their books, has determined that the stock of The Columbus Mutual Life Insurance Company may be carried on the books of The Ohio State Life Insurance Company, at three hundred thirty-three dollars ($333.00) per share so long as the provisions of Article V of the Articles of Incorporation of The Columbus Mutual Life Insurance Company remain in effect, and

Whereas, the book value of the shares of stock of this company, as customarily computed for stock life insurance companies and allowed by such association, is far in excess of three hundred thirty-three dollars ($333.00), and

Whereas, it is being considered that the two companies may in the future merge, which would require that earnings of this company be handled in conformity with the methods employed by The Ohio State Life Insurance Company, while fully protecting its present participating policyholders, now therefore,

Be it resolved, that the Fifth Article of the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as amended) be and the same is hereby amended to read as follows:

Fifth. Unassigned surplus as of December 31, 1956, as shown on the annual statement filed with the Superintendent of Insurance of Ohio, to-wit: $10,739,205.07, shall be held and used as a special surplus for policyholders for pro-

tection of the holders of participating policies of the company which are in force on the effective date of this amendment, and no dividends to any stockholders of the company shall be payable therefrom.

Annually, for a period of twenty-five (25) years after the effective date of this amendment, there shall be added to said special surplus for policyholders, as then existing, from the earnings of the company a percentage of such then existing special surplus for policyholders equal to the net earned interest rate on the mean invested assets after all taxes based on income.

Regular dividends shall be paid from the earnings of the company to all participating policyholders of the company without distinction. Additional dividends may be paid out of such special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of this amendment.

In the event of dissolution and liquidation of the company at any time so long as any participating policies of the company in force on the effective date of this amendment are then in force, such policyholders shall be entitled to distribution from such special surplus for policyholders, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of this amendment.

At the maturity of the last participating policy of the company in force on the effective date of this amendment the special surplus for policyholders, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to stockholders, except out of surplus over and above such amount.

In witness whereof, said Frank L. Barnes, First Vice President, and Orval J. Miller, Secretary, of The Columbus

Mutual Life Insurance Company, acting for and on behalf of said corporation, have hereunto subscribed their names and caused the seal of said corporation to be hereunto affixed this twenty-eighth day of October, 1957.

By Frank L. Barnes,
First Vice President,
By Orval J. Miller,
Secretary.

Approved: (See letter of transmittal and certification attached) October 29, 1957
Wm. Saxbe,
Attorney General of Ohio.

Office of the Attorney General
State of Ohio
Columbus 15

October 29, 1957.

Hon. Ted W. Brown
Secretary of State
State House
Columbus 15, Ohio

Dear Sir:

You have submitted to me amendment to Articles of Incorporation of Columbus Mutual Life Insurance Co., dated October 28, 1957, for certification in accordance with Section 3907.03, Revised Code. After careful consideration I return said amendment to you with my approval endorsed thereon, with however to the following observation:

This company was incorporated under Ohio law in 1906, as a legal reserve stock life insurance company. The company in my opinion has a present legal right to amend its Articles of Incorporation being as it is a stock company,

provided always that such amendment is not inconsistent with the constitution and laws of the United States and of this state.

It is contended on behalf of some of the participating policyholders of this company that the amendment which you have submitted may not be recorded by you on the ground that it will deprive such policyholders of constitutional rights which they may have under the present charter of the company.

Any decision reached by this office upon the complex questions raised by this amendment will not finally adjudicate the matter. It is recognized that the rights of some one hundred and fifty thousand policyholders are involved, which rights must and should in my judgment be finally determined by the Supreme Court.

In view of these facts and in order that the rights of all parties affected may be finally upon the amendment and hereby certify the same as provided by such Section 3907.03, with, however, the advice to you that, as Secretary of State, you refuse to record such amendment and certificate.

This course of procedure should enable the company to invoke the original jurisdiction of the Supreme Court, thus avoiding uncertainty and delay in the final determination of this matter. It is my opinion that facilitating and expediting this matter will best serve interests of the thousands of policyholders of this company, the shareholders, and the general public.

Very truly yours,

Wm. Saxbe,
Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 10, United States Constitution

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article XIII, Section 2, Constitution of the State of Ohio

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed: Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Section 1701.69, Revised Code of Ohio

(A) Except in the case of an amendment to the articles to change a corporation into a non-profit corporation, the articles may be amended from time to time in any respect if the articles as amended set forth all such provisions as are required in, and only such provisions as may properly be in, original articles filed at the time of adopting the amendment, and, if a change in issued shares is to be made, or if as the result of any amendment the stated capital of any class of shares is to be increased or reduced, then such provisions as are necessary to effect such change, or to effect such increase or reduction of stated capital.

(B) Without limiting the generality of such authority, the articles may be amended to:

(1) Change the name of the corporation;

(2) Change the place in this state where its principal office is to be located;

(3) Change, enlarge, or diminish its purpose or purposes;

(4) Increase or decrease the authorized number of shares of any class;

(5) Authorize shares of a new class or classes;

(6) Increase or decrease the par value of issued or unissued shares with par value;

(7) Change issued or unissued shares of any class, whether with or without par value, into the same or a different number of shares of any class with or without par value, theretofore or then authorized;

(8) Provide that, as a result of an amendment described in paragraph (6), (7), or (10) of division (B) of this section, the stated capital of any class of shares shall be increased or reduced consistent with the provisions of section 1701.30 of the Revised Code, except that in the case of an amendment to change the corporation into a non-profit corporation the stated capital of the corporation may be reduced to an amount less than five hundred dollars;

(9) Change any of the express terms of issued or unissued shares of any class or series, which change may include the discharge, adjustment, or elimination of rights to accrued undeclared cumulative dividends on the shares of such class or series;

(10) Change a corporation into a non-profit corporation;

(11) Change any provision of the articles or add any provision that may properly be included therein.

Section 1701.71, Revised Code of Ohio

(A) The shareholders at a meeting held for such purpose may adopt an amendment, including any that could be adopted by the directors, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on such proposal or, if the articles provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, and by such affirmative vote of the holders of shares of any particular class as is required by the articles. In addition, whenever under division (B) of this section the holders of shares of any particular class are entitled to vote as a class on the adoption of an amendment, such amendment in order to be adopted must receive the affirmative vote of the holders of at least two-thirds or, if the articles provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of such class. If the proposed amendment would authorize any particular corporate action which, under any applicable provision of law or under the existing articles, could be authorized only by or pursuant to a specified vote of shareholders, such amendment in order to be adopted must receive the affirmative vote so specified.

(B) Regardless of limitations or restrictions in the articles on the voting rights of the shares of any class, the holders of shares of a particular class, and in the cases specified in paragraphs (6), (7), and (8) of this division the holders of shares of every class, shall be entitled to vote as a class on the adoption of an amendment which:

(1) Increases or decreases the par value of the issued shares of the particular class;

(2) Changes issued shares of the particular class, whether with or without par value, into a lesser number of shares of the same class or into the same or a different

number of shares of any other class, with or without par value, theretofore or then authorized;

(3) Changes the express terms, or adds express terms, of the shares of the particular class in any manner substantially prejudicial to the holders thereof;

(4) Changes the express terms of issued shares of any class senior to the particular class in any manner substantially prejudicial to the holders of shares of the particular class;

(5) Authorizes shares of another class which are convertible into, or authorizes the conversion of shares of another class into, shares of the particular class, or authorizes the directors to fix or alter conversion rights of shares of another class which are convertible into shares of the particular class;

(6) Provides, in the case of an amendment described in paragraph (1) or (2) of division (B) of this section, that the stated capital of the corporation shall be reduced as a result of the amendment, or provides, in the case of an amendment described in paragraph (5) of division (B) of this section, that the stated capital of the corporation shall be reduced upon the exercise of such conversion rights;

(7) Changes substantially the purposes of the corporation, or provides that thereafter an amendment to the articles may be adopted which changes substantially the purposes of the corporation;

(8) Changes a corporation into a non-profit corporation.

(C) An amendment which changes a corporation into a non-profit corporation shall contain a statement of purposes proper in the case of a non-profit corporation, and a statement that after the effective date of the amendment the corporation shall be subject to the provisions of the Revised Code relating to non-profit corporations. In the case of a corporation formed on or after June 9, 1927, the amendment

shall also provide for the cancellation of all outstanding shares and the terms and considerations, if any, for such cancellation. In the case of a corporation formed prior to June 9, 1927, the amendment may provide for such cancellation of outstanding shares, but if it does not so provide, the amendment shall contain a provision forbidding the payment of dividends on any shares after the effective date of the amendment.

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